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In The

Supreme Court of the United States

October Term, 1994

COMMONWEALTH OF KENTUCKY, CABINET FOR HUMAN RESOURCES, DARVIN ALLEN, P. KENNETH COX, JOHN HODGKIN, RONALD HOLLAND, LYNNE MCWILLIAMS, MARGARET WHITTET AND FRANK J. WILLEY,

Petitioners,

versus

MAGGIE WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Are state officials who are not entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), because they could not reasonably conclude that an employee's charges of political corruption were false statements knowingly and recklessly made and that harm to government operations outweighed the employee's interest in speaking freely, pursuant to *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983), nevertheless entitled to qualified immunity under *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878 (1994)?

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Maggie Williams respectfully submits this brief in opposition to the petition for writ of certiorari filed by petitioners Commonwealth of Kentucky, Cabinet For Human Resources, Darvin Allen, P. Kenneth Cox, John Hodgkin, Ronald Holland, Lynne McWilliams, Margaret Whittet, and Frank J. Willey.

STATEMENT OF THE CASE

The relevant facts and ruling below are set forth in the Sixth Circuit opinion and the District Court Memorandum Opinion. [Petition For A Writ Of Certiorari And Appendix (hereafter "Pet."), pp. A1-A7, A30-33]. Petitioners' statement of the case not only is burdened with irrelevancies, [Pet. pp. 3-5], but also fails to set forth many relevant facts and misstates others. These errors and omissions relate to dispositive matters here.

First. Petitioners well knew, and there is no dispute about, the content of respondent Maggie Williams' ("Williams") speech at the time they removed and demoted her. She made her comments and reports about political corruption directly to petitioners themselves. Williams told her supervisors and supervisees that she believed the Wilkinson Administration political hiring and promotion effort violated the state merit system law. [Pet. p. A3]. Williams reported to Cox and Hodgkin that she believed Gibson was engaging in unlawful political activities on the job, using office telephones in his private business, and falsifying travel vouchers – one of which she sent to Cox. [Pet. p. A3]. She formally recommended to Cox, Whittet, and Willey that Gibson's employment with the state be terminated because of his political activities on the job. [Pet. p. A3]. Similarly, Williams told Hodgkin, Allen, Whittet, and Holland directly that she suspected that Little had "bought" her job (*i.e.* made a monetary contribution to the Governor in order to be appointed to Williams' position as Manager of the Winchester DES office), was making job referrals on political grounds, soliciting or accepting gratuities from job referral applicants, and had criminally vandalized her car.

[Pet. p. A4]. She formally reprimanded Little for engaging in partisan political activities on the job – which Hodgkin knew directly through Little's formal grievance. [Pet. p. A4]. Williams' statements and reports about Gibson and Little were one of the express bases for her removal and demotion. [Joint Appendix ("JA") No. 67, R 127, Deposition of James F. Thompson 6/25/92, pp. 246-247]. Petitioners made no claim below and make no claim here they were unaware of her comments and reports of political corruption. [Pet. p. A9].

Second. There is no evidence in the record that Williams' statements and reports of political corruption were false statements knowingly or recklessly made. Petitioners erroneously state that Williams' charges of political corruption were determined by the Office of Inspector General ("OIG") to be "false." [Pet. p. 14]. The OIG report made no such findings. Petitioners also erroneously imply that Williams made her statements after they had been "discredited" by the OIG investigation. [Pet. p. 18]. Williams did not know the contents of the OIG report until it was produced by petitioners during discovery in this action, long after she had made her statements and reports. Petitioners also misleadingly imply that Williams admitted that her charges about the selling of job referrals were false. [Pet. p. 18]. While Williams admitted she could not prove rumors about Little selling job referrals twenty (20) years ago, [Pet. p. A13 n 3], the statements at issue here related to his then-current politically corrupt actions. [Pet. p. A4]. Petitioners imply that the Sixth Circuit concluded that petitioners "reasonably believed" that Williams' statements and reports were "groundless and malicious rumor-mongering" and false. [Pet. pp. 15,

19]. In fact, the Sixth Circuit concluded that petitioners had no factual basis for believing Williams' statements were false, [Pet. p. A13], and there is evidence of record proving the truth of Williams' statement that Gibson falsified travel vouchers, [Pet. p. A3], and Little engaged in prohibited political activity on the job. [Pet. p. A4].

Third. There is no evidence in the record of office "disruption" caused by Williams' speech, other than the alienation of Gibson and Little toward her because of her reports about their illegal activities. [Pet. p. A14]. Petitioners state that Gibson's resignation, Allen's memorandum prohibiting "derogatory comments," and employee complaint letters were "hard evidence" of office disruption which was "lightly" rejected by the Sixth Circuit. [Pet. pp. 18-19]. To the contrary, the Sixth Circuit held that these "disruptions" were not caused by Williams' comments about political corruption. [Pet. p. A14]. Moreover, Gibson's resignation was beneficial "disruption," Allen's memorandum was retaliatory, and the complaint letters about Williams' "behavior," solicited by petitioners themselves, were unrelated to Williams' statements and reports on political corruption. [Pet. pp. A3, A14, A32-A33].

REASONS FOR DENIAL OF THE WRIT

The Sixth Circuit properly analyzed petitioners' actions under the "objective reasonableness" standard of *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), to determine

whether their conduct fell "clearly within the area" protected by the First Amendment, "such that a reasonable official would have known that his or her conduct violated" Williams' constitutional right. [Pet. pp. A8-A9]. Applying that standard, the court correctly determined that under the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) and *Connick v. Myers*, 461 U.S. 138, 140 (1983), petitioners could not have reasonably believed Williams' statements were false nor outweighed by the state's interest in governmental efficiency. [Pet. pp. A10-A15]. For the same reasons, petitioners' conduct also failed the new reasonableness test required by *Waters v. Churchill*, 511 U.S. ___, 128 L.Ed.2d 686, 114 S.Ct. 1878, 1888-1890 (1994); *id.* at 1893 (SOUTER, J., concurring); *id.* at 1898-1900 (STEVENS, J., concurring in the judgment).

Petitioners contended below, as they do here, that Williams' speech was not constitutionally protected since they "reasonably" believed her statements were false. The lower court correctly noted that the proper standard is whether petitioners could "reasonably believe" that Williams made her statements "with knowledge of, or reckless indifference to, their falsity." [Pet. p. A12]. The court found no basis for any such "reasonable belief" by petitioners:

> The first point we note about defendants' argument is that it does not address Williams' statements that were critical of political patronage employment practices in general. These stated opinions cannot be considered false statements at this juncture. As to Williams' statements and reports about specific politically corrupt activities by employees at the Winchester DES office,

> defendants point to no proof in the record that Williams' comments were false statements . . . Therefore, there is nothing from which we could infer that a reasonable official could have believed that Williams' statements were false statements knowingly or recklessly made.

Id.

The Sixth Circuit also employed a reasonableness standard to determine whether Williams' interest in speaking freely on a matter of public concern was outweighed by the state's interest in promoting the efficiency of public services. [Pet. p. A13]. The court noted:

> [W]e must decide whether defendants reasonably could have believed that the harm to the office's efficiency outweighed Williams' interest in speaking freely.

Id. In striking the "*Pickering/Connick* balance" against petitioners, the lower court determined that "no reasonable official" could have believed that the state's interest in efficient operations outweighed Williams' interest in commenting on political patronage hiring and promoting practices and reporting specific instances of political misconduct. [Pet. p. A14]. Specifically, the lower court held that:

> As to Williams' statements criticizing the political patronage hiring and promoting practices, no reasonable official could have believed that the state's interest in efficient operations outweighed Williams' interest in commenting on these matters. . . . As to Williams' statements and reports about specific instances of political patronage and politically corrupt practices in

> the office, there is one countervailing state interest. These statements and reports did have the effect of creating disharmony between Williams and the employees she reported, Gibson and Little. However, no reasonable official could conclude that this interest outweighed Williams' interest in reporting these instances of political misconduct.

Id. The court thus held that Williams had spoken out on matters of great public concern with minimal effect on the efficiency of the office, and no reasonable official could have concluded otherwise. [Pet. p. A15].

Petitioners contend here that Waters makes binding on federal courts the "facts as reasonably found by the State Officials," and argue that the Sixth Circuit used "the wrong version of the facts," namely, "the plaintiff's version of the facts rather than the facts as reasonably found by the State Officials," then erroneously required petitioners to prove Williams' statements and reports were false. [Pet. pp. 15, 16]. These contentions are without merit.

First. *Waters* expressly rejects the proposition that the court is bound by the employer's version of the facts:

> [W]e do not believe that the court must apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. . . . It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient. . . . *We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the*

> *employer reasonably found them to be.* (Emphasis added).

Waters v. Churchill, supra, at 1889; *id.* at 1893 (the reasonableness test enunciated by the *Waters'* plurality "is clearly the one that lower courts should apply.") (SOUTER, J., concurring). The new constitutional reasonableness requirement imposed on public employers by *Waters* is to be enforced by the courts – not the employers.

Moreover, it is clear under *Waters* that courts should conclude that a public employer cannot draw a "reasonable" conclusion as to the facts without substantial evidence to support that belief:

> It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available.

Id. at 1889. Consistent with these requirements, the Sixth Circuit found there is no evidence from which petitioners could reasonably conclude that Williams' statements were false statements made knowingly or recklessly, [Pet. p. A13], nor to conclude that the state's interest in governmental efficiency outweighed Williams' interest in exposing political corruption. [Pet. p. A14]. In fact, the lower court held that the "*Pickering/Connick* balance" tilts so strongly against petitioners on this record that any possible "imprecision" in its standard makes no difference here. [Pet. p. A15]. The result under *Waters* would be the same.

Second. The Sixth Circuit did not use the "wrong" version of the facts in performing this "*Pickering/Connick* balance." To the contrary, the Sixth Circuit used the only "version" of the facts that exists in this record, specifically, Williams' statements and reports on political corruption for which she was removed and demoted. These were constitutionally protected unless petitioners proved they were false statements made knowingly or with reckless indifference to their truth. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Pickering v. Board of Education, supra*, at 821. Petitioners failed to prove that Williams' statements were "false," much less that they were false statements made knowingly or recklessly. [Pet. pp. A12, A13]. The result under *Waters* would be the same.

Third. The lower court did not err by imposing on petitioners the burden of proving that Williams' statements were false. [Pet. p. 15]. That burden is imposed by *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965) (government must bear the burden of proving that speech is unprotected) and *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (same). *Waters* did not "lift" that burden from petitioners. *Waters v. Churchill, supra*, at 1884, 1887 (government must make a substantial showing that employee speech on public matters is likely to be disruptive before such speech can be punished). Far from modifying or repudiating these principles, the *Waters* decision is predicated on them. By imposing an additional constitutional requirement and burden of proof on public employers, the *Waters* court did not thereby relieve them of their existing ones. Petitioners simply failed to carry their settled burden of proof on the falsity issue. *See* Federal Rules of Civil Procedure, Rule 56(e); *Celotex Corp. v. Catrett*, 477

U.S. 317, 322 (1986) (summary judgment should be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial). The result under *Waters* would be the same.

In the final analysis, petitioners' stated grounds for review rest on a fatal flaw. There is no evidence in this record to support a *Waters'* "reasonable belief" in the falsity of Williams' speech. The *Pickering/Connick* test is to be applied to the speech for which Williams was fired. *Waters, supra,* at 1890. Petitioners must have reasonably believed Williams' speech was unprotected, *id.* at 1888, and a conclusion that it was false based on "no evidence at all" is an unreasonable belief. *Id.* An unreasonable belief that speech is false is pretextual and cannot shield disciplinary action taken because of an employee's protected speech. *Waters, id.* at 1890-1891 (SOUTER, J., concurring). The Sixth Circuit found that "defendants here point to nothing in the record that contradicts Williams' statements and reports." [Pet. p. A13]. The result under *Waters* would be the same.

CONCLUSION

The ruling below is not in conflict with *Waters* and raises no important unresolved questions for other public employers. The petition for writ of certiorari should be denied.

Respectfully submitted,

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